Nos. 6179, 6180, 6181-6182

In the United States Circuit Court of Appeals for the Ninth Circuit

LEON L. MOISE, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

GERALD F. SCHLESINGER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

LEROY SCHLESINGER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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PREVIOUS OPINION

The only previous opinion in the present cases is that of the United States Board of Tax Appeals (R. 32–36), which is reported in 13 B. T. A. 528.

JURISDICTION

The appeals in the above-entitled cases involve income taxes of Leon L. Moise for the years 1918, 1919, and 1920 in the amounts of $2,146.41, $7,275.23, and $211.66, respectively (R. 39, 40); income taxes of Gerald F. Schlesinger for the years 1918 and 1919 in the amounts of $1,848.86 and $7,182.68, respectively (R. 124, 125), and income taxes of LeRoy Schlesinger for the years 1918 and 1920 in the amounts of $1,529.19 and $219.68, respectively (R. 163, 164, 200, 201), and are taken from decisions (orders of redetermination) of the Board of Tax Appeals entered on December 15, 1928 (R. 39, 124, 163), and December 14, 1928 (R. 163). The cases are brought to this Court by petitions for review filed June 11, 1929 (R. 39–55, 125–140, 164–177, 200–215), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Whether the respondent in his amended answers made such claims for increased deficiencies as were required to give the Board of Tax Appeals jurisdiction to determine such increases under Section 274 (e) of the Revenue Act of 1926.

2. Whether the assessment and/or collection of all or any part of the deficiencies asserted by the respondent is barred by statutes of limitation.

3. Whether the evidence so conclusively showed that the partnership of which the petitioners were

members was entitled to its claimed deduction for obsolescence of its tangible assets that the Board's refusal to reverse the Commissioner's action in disallowing the deduction should be set aside by this Court.

4. Whether the partnership was properly disallowed a deduction from gross income on account of obsolescence of good will.

STATUTES INVOLVED

The statutes involved will be found in the Appendix.

STATEMENT OF FACTS

The instant cases were consolidated before the Board and the Board made consolidated findings of fact in substance, as follows:

Leon L. Moise, Gerald F. Schlesinger, and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender, of San Francisco, California, which was engaged in the wholesale liquor business from the time of its formation, July 1, 1918, until January 16, 1920, the date of its dissolution and termination of business. For many years prior to the formation of the partnership the liquor business of the three individuals had been conducted in the same location as a corporation. The premises and plant occupied by the partnership in the conduct of its wholesale liquor business were acquired under the terms of a lease entered into in 1910 between H. Levi & Co., a California corporation, lessor, and Schlesinger and Bender, Inc., a

California corporation, lessee. The principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for the period of 15 years. The lease also provided that all additions, such as improvements and fixtures, should be made at the lessee's expense and at the cancellation or termination of the lease should revert to the lessor. The lease further provided that no business other than that of the lessee should be conducted on the premises. (R. 25–26.)

Believing that it would be compelled to terminate its business in 1920 by reason of national prohibition legislation, and believing that its leasehold improvements and equipment would be wholly obsolete at that time, the partnership charged off its books as a loss on December 31, 1918, the amounts of $7,200, the balance remaining in its "Building" account, and $13,965.03, the balance remaining in its "Furniture and Fixtures" account.

Upon closing its affairs early in 1920 the partnership sold its furniture and equipment, but no entries of such sales were made on its books. The lease, by virtue of which the partnership occupied its business property, was terminated about April 1, 1930, and shortly thereafter the premises were vacated. (R. 26.)

The partnership filed returns for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920.

In its return for the six months' period July 1, 1918, to December 31, 1918, the partnership claimed as a deduction from gross income the sum of $21,848.60 as exhaustion, wear, and tear (including obsolescence) of its tangible properties. The Commissioner disallowed this sum as a deduction and refused to allow any amount as a deduction for the obsolescence of tangible property of the partnership.

In its return for the year 1920 the partnership included in its gross income that year the sum of $7,801.18 representing the proceeds received from sales of cooperage, scrap, and office furniture.

In its returns filed for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920, the partnership claimed certain amounts therein as deductions from gross income for the obsolescence of good will. The Commissioner, in a letter dated October 22, 1924, signed by A. Lewis, head of division, and addressed to Schlesinger and Bender and received by it, informed the partnership that the correct amount of $52,814.70 was allowed the partnership as obsolescence of good will for prohibition purposes, and indicated its distribution over the three years 1918, 1919, and 1920.

Each of the petitioners involved in these proceedings filed individual income tax returns covering the years in which deficiencies have been asserted. (R. 27.)

The return of Leon L. Moise for the year 1918 was filed with the Collector in the First District of

California not later than March 15, 1919. His return for the year 1919 was filed with the Collector in the same district of California not later than March 15, 1920.

An undated income and surtax written consent covering 1918 and expiring March 1, 1925, bearing the purported signatures of Leon L. Moise and D. H. Blair, Commissioner, acknowledged January 4, 1924, was filed with the Commissioner. An income and profits tax consent for 1918 dated February 3, 1925, and expiring December 31, 1925, was executed and filed by the same petitioner. The said petitioner also signed a written consent covering 1919, dated February 3, 1925, and expiring December 31, 1925. Both of the two last-mentioned consents were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of Gerald F. Schlesinger for the year 1918 was filed with the Collector at Chicago, Illinois, not later than March 22, 1919. This return bears the stamp "Collector of Internal Revenue, Paid March 15, 1919, Cashier—A, Chicago, Illinois." It also bears the stamp "Collector Int. Rev. March 22, 1919." This return was sworn to under date of March 20, 1919. The return for the year 1919 was filed with the Collector in the First District of California, March 15, 1920. (R. 27–28.)

An income and surtax waiver dated February 25, 1924, covering 1918 and expiring March 1, 1925, and bearing the purported signatures of Gerald F.

Schlesinger and D. H. Blair, Commissioner, was filed with the Commissioner. An income and profits tax waiver for 1918, dated February 3, 1925, and expiring December 31, 1925, was signed by Gerald F. Schlesinger and filed on the said date. He likewise signed an income and profits tax waiver covering 1919 dated January 30, 1925, and expiring December 31, 1925. Both of the two last-mentioned waivers were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue. (R. 28–29.)

The return of LeRoy Schlesinger for the year 1918 was filed with the Collector in the First District of California not later than March 15, 1919.

The petitioner, LeRoy Schlesinger, executed an undated income and surtax waiver for the year 1918 expiring March 1, 1925. This document was accepted on January 4, 1924, and bears on its reverse side the stamp "Personal Audit #4, September 19, 1924, Received."

On July 29, 1925, the respondent issued 60-day letters to petitioner Moise and Gerald F. Schlesinger, notifying them of his final determination of the deficiencies hereinabove set forth. On September 4, 1925, the respondent notified petitioner, LeRoy Schlesinger, that his claim for abatement had been rejected. (R. 29.)

Petitioners allege in paragraph 5 (c) of their petitions as follows:

> The Commissioner in his letter dated October 22, 1924, file IT: PAP4–GWF–406 al-

lowed as a deduction to Schlesinger and Bender obsolescence of good will amounting to $52,814.70 apportionable between the years 1918, 1919, and 1920, as follows:

1918, 12/37	$17,129.09
1919, 24/37	34,258.19
1920, 1/37	1,427.42
As above	52,814.70

(R. 29–30.)

Upon motions made and duly granted by the Board the Commissioner filed amended answers in each of these proceedings, in paragraph 4 (a) of which he denies that he had erred in refusing to allow a deduction from gross income of the partnership of which the petitioners were members for obsolescence of tangible property and affirmatively alleged in Docket 8036, LeRoy Schlesinger, "that the Commissioner erred in not including in the petitioner's income for the year 1918, $5,709.70, and for the year 1919, $11,419.39, said amounts being the petitioner's distributive interest in $52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of good will."

In paragraph 5 (c) of his amended answer in this proceeding the Commissioner states as follows:

> Admits the allegations contained in subdivision (c) of paragraph 5 of the petition and alleges that the obsolescence of good will, amounting to $52,814.70, deducted by Schlesinger and Bender as alleged in subdivision

> (c) of paragraph 5 of the petition is not allowable deduction to said copartnership. (R. 30.)

In the amended answer in Docket 7453, Leon L. Moise, the Commissioner, denied that he had erred as alleged in paragraph 4 (a) of the petition and "alleged that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70; for the year 1919, $11,419.39; and for the year 1920, $475.80, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920 by Schlesinger and Bender as obsolescence of good will." And, in paragraph 5 (c) of his amended answer in this proceeding, stated as set forth above by the amended answer in Docket 8036, LeRoy Schlesinger. The Commissioner alleged and admitted as set forth above in the proceeding of this taxpayer in Docket 7455. (R. 30–31.)

The amended answer in proceeding of Gerald F. Schlesinger, Docket No. 7454, contained the same admissions and allegations as first above set forth in the proceeding of LeRoy Schlesinger, Docket 7455.

These amended answers, after specifically admitting and denying every allegation of the petition, conclude as follows:

> Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not here-

inbefore expressly admitted, qualified, or denied. WHEREFORE, it is prays that the appeal be denied.

At the hearing of these proceedings counsel for the Commissioner contended for an increase of deficiencies upon the affirmative allegations in the amended answers in respect of the deduction of obsolescence for good will. (R. 31.)

SUMMARY OF ARGUMENT

Section 278 (e) of the Revenue Act of 1926 is by Section 283 (a) and (b) made applicable to these cases which were pending before the Board of Tax Appeals at the time of the passage of the Act. Under that Act the Board had authority to increase the amount of the deficiencies originally asserted by the Commissioner, if claim for such additional deficiencies was asserted at or prior to the hearing. Here the Commissioner asserted claims several weeks before the hearing in amended answers. Even though the Commissioner did not set forth the exact amount of the increased deficiency, he gave sufficient information as to the basis of the increase to enable the taxpayers to compute the amounts. The increases were, therefore, properly asserted.

The increases in the deficiencies stand on the same footing as the deficiencies originally asserted in so far as the statute of limitations is concerned. Section 277 (a) of the Revenue Act of 1924. Assuming the validity of the waivers in the cases of

petitioners Moise and G. Schlesinger, the Commissioner had until December 31, 1925, within which to assess and collect the entire deficiencies, and prior to that date he mailed notices of deficiencies which have suspended the running of the statute until the decision of the Board became final. Section 274 (a) and Section 1001 (c) of the Revenue Act of 1926, the latter as amended by Section 603 of the Revenue Act of 1928 and Section 1005 of the Revenue Act of 1926.

No waiver as to the 1920 deficiency of LeRoy Schlesinger for the reason that the deficiency notice was mailed prior to the expiration of the five-year period of limitations.

As to the 1918 deficiency of LeRoy Schlesinger the Record shows that the notice of deficiency mailed September 4, 1925, followed the rejection of a claim for abatement; a claim for abatement could have been filed only in the event that an assessment was made. (Section 279 of the Revenue Act of 1924.) The Record, however, does not show when the abatement claim was filed or when the assessment was made. The waiver, if valid, extended the period of limitations for both assessment and collection until March 1, 1925. If the assessment was made between June 2, 1924 (the date of the passage of the Revenue Act of 1924) and March 1, 1925, the six-year period for collection under Section 278 (d) of the Revenue Act of 1924 applies, and before that period could have expired the filing of the claim and the filing of the

appeal to the Board suspended the running of the statute until the decision of the Board becomes final. Moreover, even if the assessment was made prior to June 2, 1924, and if the abatement claim was filed prior to March 1, 1925, Section 279 of the Revenue Act of 1924 suspended the running of the statute until the decision of the Board was final. Since if either of these situations exists, the collection of the tax was not barred and since the taxpayer failed to prove that they did not exist it can not be said that the statute of limitations has run.

The waivers were valid even though they were executed by the Commissioner after the expiration of the statutory period of limitation. *Stange* v. *United States,* 282 U. S. 270. Moreover, the Commissioner's signature was not required to give effect to the waivers.

The Board of Tax Appeals held that the taxpayer had not sustained the burden of proving the Commissioner wrong in disallowing as a deduction from the gross income of the partnership of which income they were members for obsolescence of tangible assets due to prohibition legislation. The Board's decision on this question should not be reversed by this Court for the reason that the Record does not show conclusively how the amount deducted was arrived at or that the taxpayer gave proper effect to all items necessarily entering into a computation of a deduction for obsolescence. Hence, the Board's action should be sustained.

The petitioners were not entitled to a reduction of gross income on account of the Supposed obsolescence of good will of the partnership due to the enactment of prohibition legislation. *Clark* v. *Haberle Brewing Co.,* 280 U. S. 384.

ARGUMENT

I

The claims for increased deficiencies were definitely asserted by respondent in exact accordance with the statutory requirements

Section 273 (1) of the Revenue Act of 1926, *infra,* provides that the word "deficiency" as used in respect of a tax imposed by that Act means the amount by which the tax imposed by that Act exceeds the amount shown as the tax by the taxpayer upon his return (with adjustments for previous abatements, refunds, etc.). The definition of "deficiency" under Section 273 (1) of the Revenue Act of 1924 is similar except that it does not limit the application to taxes imposed by the Revenue Act of 1924. This distinction is immaterial because of other provisions in the Revenue Act of 1926, which, as will be pointed out, make the definition applicable to determinations of tax liability for prior years.

Section 274 (e) of the Revenue Act of 1926, *infra,* provides that the Board of Tax Appeals shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the

taxpayer and to determine whether any penalty, additional amount, or addition to the tax should be assessed, "if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing." The Revenue Act of 1924 did not contain a similar provision, Section 274 (b) of that Act provides, however, that if the Board determines there is a deficiency, "the amount as determined shall be assessed, etc.," and in the appeal of *The Hotel De France Co.*, 1 B. T. A. 28, the Board held that it had jurisdiction to determine a greater deficiency than that asserted by the Commissioner. But see *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716.

The petitioners argue that Section 274 (e) of the Revenue Act of 1926, *infra,* is not applicable to the proceedings in these cases, and that even if it were applicable, the Commissioner did not effectively assert a claim for an increased deficiency before the Board as required under Section 274 (e), and hence such portions of the deficiencies found by the Board as exceed the original deficiencies proposed by the Commissioner were improperly determined and can not be assessed and collected.

The first contention that Section 274 (e) does not apply is effectively answered by considering certain other provisions of the statute in relation to the facts in these cases.

It is pointed out that the notices of deficiencies were mailed to the taxpayers and their appeals were taken while the Revenue Act of 1924 was in

effect, but the hearing before the Board occurred after the passage of the Revenue Act of 1926 on February 26, 1926. (Moise, R. 2, 5, 10; G. Schlesinger, R. 2, 109, 113; L. Schlesinger, R. 2, 149, 154, 185, 190.)

Section 283 (b) of the Revenue Act of 1926, *infra,* specifically relates to a case of that character. This Section provides that if before the enactment of the Revenue Act of 1926, an appeal to the Board was taken in accordance with the provisions of the Revenue Act of 1924 and the appeal is pending before the Board at the time of the enactment of the Act the Board shall have jurisdiction of the appeal and "the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts shall (with certain exceptions not here material) be determined, and the computation of tax shall be made in the same manner as provided in subdivision (a) of this section."

Section 283 (a), *infra,* thus referred to, provides that if after the enactment of the Revenue Act of 1926 the Commissioner determines that any assessment should be made in respect of any tax due under the Revenue Acts of 1916, 1917, 1918, 1921, and/or 1924 or under any such act as amended, he is authorized to send to the person from whom such tax is due notice of the amount proposed to be assessed and that such notice for the purposes of the Revenue Act of 1926 shall be considered a notice

under Section 274 (a) of the Act. Section 283 (a) of the Revenue Act of 1926 further provides that in the case of such determination the amount which should be assessed shall be computed as if the 1926 Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by the Revenue Act of 1926 (with exceptions not material here). It is thus clearly intended by the unambiguous language of Section 283 (a) and (b) of the 1926 Act that the provisions of Section 274 (a) and (2) of that Act shall apply with full force to the situations existing in these appeals. In other words, Section 283 (a) and (b) specifically confer upon the Board the same jurisdiction in respect to appeals pending before it at the time of the enactment of the Revenue Act of 1926 as is conferred in the case of appeals taken thereafter. In this connection attention is called to the fact that in the *Old Colony Tr. Co. case, supra,* the Supreme Court apparently recognized that Section 283 (b) did affect pending proceedings and that in its recent decision in the case of *W. P. Brown & Sons Lumber Co.* v. *Commissioner,* 282 U. S. 283, it held that Section 277 (b) and Section 283 (f) were to be given retrospective effect.

In view of the fact that Section 283 (a) and (b) are unambiguous and clearly were designed to affect pending proceedings, the case of *Russell* v. *United States,* 278 U. S. 181, and other cases cited

by petitioners to the effect that a statute should not be construed with retrospective application, if it is possible to avoid such construction, are not in point. It is pointed out, moreover, that the change effected by Section 274 (e) of the Revenue Act of 1926 was a change in procedure and not in substantive rights, and that statutes which merely affect pending proceedings in the matter of procedure are generally found unobjectionable. *Railroad Co.* v. *Grant,* 98 U. S. 398; *Freeborn* v. *Smith,* 2 Wall. 160; *United States* v. *Heinzen & Co.,* 206 U. S. 370; *Insurance & Title Guarantee Co.* v. *Commissioner* (C. C. A. 2nd), 36 F. (2d) 842.

We come, therefore, to the question as to whether the Commissioner complied with the requirements of Section 274 (e).

The Commissioner of Internal Revenue, in accordance with the provisions of Section 274 (a) of the Revenue Act of 1924, mailed to each petitioner herein the notices of deficiency provided for by law (Moise, R. 10; G. Schlesinger, R. 113; L. Schlesinger, R. 154, 190) on July 29, 1925 (except in the case of LeRoy Schlesinger, the notice of rejection of his claim in abatement of 1918 taxes having been mailed on September 4, 1925, R. 190). From these determinations petitioner appealed to the United States Board of Tax Appeals. (Moise, R. 5; G. Schlesinger, R. 109; L. Schlesinger, R. 149, 185.) The Commissioner of Internal Revenue filed an amended answer to each petition. (Moise, R. 16–18; G. Schlesinger, R. 119–120; L. Schles-

inger, R. 159–160, 195–197.) All such amended answers were filed on April 8, 1927, a date subsequent to the date of the passage of the Revenue Act of 1926.

Examination of the petitions filed with the Board of Tax Appeals reveals that in paragraph 5 (c) the petitioners asserted that the Commissioner had allowed as a deduction to the partnership of Schlesinger & Bender the sum of $52,814.70 as obsolescence of good will, that sum apportionable between the years 1918, 1919, and 1920. (Moise, R. 7; G. Schlesinger, R. 111; L. Schlesinger, R. 151, 187.)

The original answers of respondent (Moise, R. 14–15; G. Schlesinger, R. 117–118; L. Schlesinger, R. 157–158; 193–194) were silent in respect of the error of the Commissioner in allowing a deduction on account of obsolescence of good will.

On April 8, 1927, the respondent amended his answers to the several petitions. (Moise, R. 16–18; G. Schlesinger, R. 119–120; L. Schlesinger, R. 159–160; 195–197.) In the *Moise case,* which is typical, the Commissioner alleged that he had erred in not including in petitioners' income for the year 1918, $5,709.70; for the year 1919, $11,419.39; and for the year 1920, $475.60, said amounts being petitioners' distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender, as obsolescence of good will. In each amended answer the Commissioner

further admitted the allegations of paragraph 5 (c) in the petition and alleged "that the obsolescence of good will amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said partnership." (Moise, R. 17; G. Schlesinger, R. 120; L. Schlesinger, R. 159–160; 196.) The amended answers of respondent were filed on April 8, 1927, and the causes came on for hearing before the Board on May 4, 1927 (R. 58), at which time petitioners amended their petitions setting up as a further defense to the asserted claims of respondent that the statute of limitations had barred the assessment and collection of the deficiencies involved. (Moise, R. 18–19; G. Schlesinger, 121–122; L. Schlesinger, R. 161–162; R. 197–198.)

At the hearing before the Board counsel for petitioners admitted that the amended answers had been served upon petitioners "two or three weeks prior to the hearing" (R. 59) so that no element of surprise was present such as might have warranted postponement of the hearing.

Petitioners assert that the allegations of respondent's amended answers do not amount to the assertion of a claim in that they are purely *defensive;* that they make no *demand;* and *that they specify no amounts of tax.*

We submit that this argument is not sound. An affirmative allegation of error is not a negative de-

fense. Moreover, to require that the word "claim" in Section 274 (e) of the Act should be so narrowly construed would require the Commissioner to use a more formal procedure in asserting an additional deficiency than he is required to use in asserting the original deficiency under Section 274 (a), a result which would seem unreasonable. The word "claim" is a word of many meanings and its use in Section 274 (e) is indicative of the purpose of the statute which was merely that the taxpayer should not have an additional deficiency asserted against him without warning. The mere fact that the claim for an increased deficiency was not expressed in terms of dollars and cents is of no real significance or importance because a computation of the tax based upon the stated additions to petitioner's gross income would be a simple matter of mathematics. *"Id certum est quod certum reddi potest."* Further than this, the statement of the claim in dollars and cents was not necessary as under the anticipated decision and opinion of the Board it would later become necessary to recompute the tax. This was done. The Board was able to determine the correct tax based in part upon the claim asserted. Moreover, petitioners were fully apprised of the exact nature of and basis for the claim, since in their petitions to the Board they asserted that the Commissioner in an earlier letter had allowed the deduction on account of obsolescence of good will. (Moise, R. 7; G. Schlesinger, R. 111; L. Schlesinger, R. 151, 187.)

The case of *Cement Gun Co.* v. *Commissioner* (D. C. App.), 36 F. (2d) 107, is analogous. In that case the Court said (p. 108):

> In this case the Commissioner, in his amended answer to the Board, set forth the error in his determination of the deficiency for the year 1920 and requested that the deficiencies be increased by the amount of the partial allowance he had made for that year. This correction was made by the Board. The Board in its redetermination of the deficiency was acting clearly within its jurisdiction and authority.

As has been pointed out, the object of pleadings is to put the taxpayer on notice of the claims of the Commissioner, the amount of the resulting deficiencies being simply a matter of mathematical computation in accordance with the law. The record herein fails to reveal in what respect the petitioner has been prejudiced. The character of the amendments to respondent's answers in these cases can not be subject to the criticism of vagueness and indefiniteness, because the amendments specifically allege that the Commissioner erred in allowing certain deductions from gross income on account of the alleged obsolescence of good will of the partnership and state specifically in figures the result upon the gross incomes of these petitioners. That the claims might have gone further and set forth the precise amount does not prove them insufficient, since the resulting tax could easily be ascertained. As the purpose of the requirement

that claim be made is merely to put a petitioner on notice and to place the new matter in issue it would seem from what has been said that every requirement of the Act had been fully met.

II

The statute of limitations has not barred the assessment and/or collection of the deficiencies asserted

(a) Neither all of the deficiencies nor those parts of the deficiencies asserted by the claim set out in respondent's pleadings are barred from assessment and collection, if the waivers are valid

In the interests of clarity the case of each petitioner for each taxable year involved will be discussed separately.

Leon L. Moise

(1918)

The return of Leon Moise for the year 1918 was filed on March 15, 1919. (R. 27–28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1924. (See Section 250 (d) of the Revenue Act of 1921, Section 277 (a) (2) of the Revenue Act of 1924, Section 277 (a) (3) of the Revenue Act of 1926.) Assuming, for the purposes of explanation here, the validity of the waivers given by petitioner (R. 28), the time within which assessment and collection might have been made was extended to December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of

deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 10.) Under the provisions of Section 277 (b) of the Revenue Act of 1924 the mailing of the notice and the filing of an appeal from the Commissioner's action placed the statute of limitations in a state of suspense, in which state it will remain until the decision of the Board becomes final. (See Section 274 (a) and Section 1001 (c) of the Revenue Act of 1926, the latter as amended by Section 603 of the Revenue Act of 1928 and Section 1005 of the Revenue Act of 1926.)

Assuming the validity of the waivers, therefore, it is clear that the statute of limitations does not bar the assessment and collection of the deficiency for 1918.

The petitioner, however, urges that in so far as the deficiency found by the Board is attributable to the disallowance of a deduction for obsolescence of good will to the partnership, assessment and collection is barred, since the amended answers in which that part of the deficiency was first asserted were not filed until April, 1927.

We submit that this construction of the statutes is untenable.

Subdivision (b) of Section 277 of the Revenue Act of 1924, which was in effect when the notice of deficiency in this case was mailed, provides that the period within which an assessment is required to be made by subdivision (a) of that Section in re-

spect of *"any deficiency"* shall be extended if a notice of *such deficiency* has been mailed to the taxpayer under subdivision (a) of Section 274. Section 277 (b) of the Revenue Act of 1926, which was in effect when the deficiency was determined by the Board is substantially the same.

Section 277 (a) of both acts provide in effect that the amount of income taxes *imposed* by the earlier acts shall be assessed within certain prescribed periods. It is the tax actually imposed by the act in respect of which the period of limitations is placed in a state of suspense by the mailing of the notice provided for in Section 274 and not merely the exact amount of the deficiency stated to be due in such notice. The definition of the word "deficiency" set forth in Sections 273 (1) of the Revenue Acts of 1924 and 1926 clearly indicates that that word as used in Section 277 (b) of those acts was intended to describe and actually does describe not the amount set forth in the so-called deficiency notice but describes and is intended to describe the difference between the amount shown by the taxpayer on his return to be due and the amount of tax actually imposed by the appropriate act. Further than this, Section 277 (b) of both acts provides that the statute of limitations shall be in a state of suspense *if a notice of deficiency* has been mailed to the taxpayer. The section does not provide, as it easily might have, that the statute of limitations should be in a state of suspense merely to

the extent of the claim asserted in the deficiency letter.

A somewhat similar contention was presented to this Court in the recent case of *Sooy* v. *Commissioner,* 40 F. (2d) 634, where the petitioner in that case contended that the statute of limitations had not placed in a state of suspense a part of the deficiency asserted in the deficiency notice because by his appeal to the Board of Tax Appeals he had placed in dispute only a part thereof and that as to the remainder the statute of limitations had run. This Court in that case said, *inter alia:*

> True, as a ground for his appeal, he (the petitioner) assigned the disallowance of his claimed deduction for bad debts, but that consideration does not alter the fact that his appeal was from the Commissioner's "determination" of his deficiency in the amount of $1,605.85. It could as reasonably be argued that an appeal from a final judgment for a stated single amount does not operate as a *supersedeas* merely because appellant assigns as error only the inclusion in the verdict of interest, or some other item, constituting a part of the amount of the judgment.
> * * * In computing income taxes a statutory rate must be selected appropriate to the total amount of taxable income considered as a single unit, and until there is a determination of such income, in many cases at least, no computation can be intelligently or safely made. * * *. (Italics and parenthetical words supplied.)

If, as the statute indicates, a "deficiency" is the difference between the amount shown by the taxpayer upon his return to be the tax and the tax actually imposed by the Act, then, as in this case, the Commissioner has asserted a deficiency within the statutory period of limitations as extended by valid waiver; and as the period of limitation for assessment of the correct tax liability is extended during the pendency of the appeal and until the decision of the Board of Tax Appeals becomes final, it is clear that the claim for an increased amount of tax was made by respondent during the period of limitations as extended by waiver and by statute, and that such claim was asserted within time.

In the case of *Peerless Woolen Mills* v. *Rose* (C. C. A. 5th), 28 F. (2d) 661, the taxpayer filed a return showing a tax liability of approximately $116,000, of which one-half was paid. The Commissioner of Internal Revenue assessed the tax at the full amount shown by the return which left an unpaid balance of approximately $58,000 claimed as still due. Various waivers were signed by the taxpayer extending the statutory period of limitations for assessment and collection. Finally the Commissioner made a deficiency assessment of approximately $18,000 in excess of the original assessment. Thereupon the taxpayer filed an appeal with the Board of Tax Appeals for a redetermination of the deficiency, claiming that the original assessment was barred by the statute of limitations. While this proceeding was pending the Collector caused

a distraint warrant to be issued and levied upon the taxpayer's property and gave notice that the property would be sold and the taxpayer brought an action to enjoin the Collector.

Upon appeal from the District Court's decision the Circuit Court of Appeals held that a suit to enjoin the Collector of the original assessment would lie under Section 274 (a) of the Revenue Act of 1926, the Board having jurisdiction over the entire controversy. The Court said (p. 662):

> It (the Board) is not bound by the assessment, but has power to raise or lower it, or to hold that there was no deficiency. In order to act intelligently and determine the total amount of tax due, it had the right to inquire whether any part of the tax was erroneously found to be due. By the Revenue Act of 1926 it is provided in section 284 (d) * * * that, if the taxpayer appeal to the Board, he can not sue to recover any part of the tax, but under subdivision (e) of that section the Board was given jurisdiction, if it should find that there was no deficiency, and that the taxpayer had made an overpayment of the tax, to determine the amount of such overpayment and direct that it be credited or refunded. * * *
>
> *We are of opinion that it results from these statutory provisions that, while the Board has no jurisdiction where there is no deficiency assessment, yet, if there is a deficiency assessment, the jurisdiction of the Board extends to the whole controversy, to*

> *the end that it may determine or redetermine the correct amount of the tax.*
>
> The jurisdiction of the Board having been shown to exist, section 274 (a) of the Revenue Act of 1926 * * * is applicable. That section prohibits a proceeding by distraint until the decision of the Board has become final, and confers upon the District Courts of the United States jurisdiction to enjoin collection of the tax, notwithstanding the provisions of R. S. section 3224. Under the admitted facts, we are of opinion that it was error to refuse to issue an injunction. (Italics and parenthetical words supplied.)

From the decision of the Court in the *Peerless Woolen Mills case* it is apparent that the Board had jurisdiction in this case to determine the correct amount of the deficiency, a valid claim for an increased deficiency having been asserted in strict accordance with the statute, and that, under these circumstances, if the Commissioner of Internal Revenue, through the Collector of Internal Revenue, had attempted to collect that part of the deficiency due on account of the disallowance of a claimed deduction on account of obsolescence of good will, such collection would have and could have been the subject of injunction.[1]

That the increased deficiencies are on the same footing as the original deficiencies in so far as the statute of limitations is concerned is further sup-

[1] The *Peerless Woolen Mills case* was cited with approval in a footnote in *W. P. Brown & Sons Lumber Co.* v. *Commissioner*, *supra*.

ported by consideration of the fact that if the petitioner's contentions were carried to their logical conclusion Section 274 (e) could not be given effect in any case where the Commissioner had mailed deficiency letters just prior to the expiration of the statutory period of limitations unextended by waivers, for he would thereafter be entirely precluded from determining any additional deficiency.

If, as this taxpayer here contends, it is necessary for the Commissioner to assert the claim for an additional amount of tax not only at or before the hearing or a rehearing before the Board of Tax Appeals, but also within the time limits of the statute as such may have been extended by waivers and to this extent only, then it is difficult to understand why Congress did not add at the end of Section 274 (e) the proviso that the claim referred to by that section must in all events be not only asserted at or before the hearing before the Board of Tax Appeals but that such must also be asserted prior to the expiration of the statutory period as extended by a waiver and unaffected by the pendency of the appeal.

Leon L. Moise

(1919)

The return of Leon L. Moise for the year 1919 was filed March 15, 1920. (R. 28.)

The normal five-year period for assessment and collection of 1919 taxes would have expired on March 15, 1925. (See Section 277 (a) (2) of the

Revenue Act of 1924; Section 277 (a) (3) of Revenue Act of 1926.) Assuming the validity of the waiver given by petitioner, the time within which assessment and collection might be made would not have expired until December 31, 1925. (R. 28.) On July 29, 1925, the Commissioner of Internal Revenue mailed a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 10.) The mailing of the notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. (See Sections 277 (b) of the Revenue Act of 1924, Sections 274 (a), 1001 (c) as amended, and 1005 of the Revenue Act of 1926, *infra.*)

The same considerations which have been advanced under the heading of "Leon L. Moise—1918," *ante,* are applicable here.

Gerald F. Schlesinger

(1918)

The return of Gerald F. Schlesinger for the year 1918 was filed not later than March 22, 1919. (R. 28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired not later than March 22, 1924. Assuming, for the purposes of explanation here, the validity of the waivers given by petitioner, the time within which assessment and collection might have been made was ex-

tended to December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 113.) The mailing of this notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense, in which state it will remain until the decision of the Board becomes final. See Sections 277 (b) of the Revenue Act of 1924, 274 (a), 1001 (c) as amended and 1005 of the Revenue Act of 1926, *infra.*

The same considerations which are advanced in the case of Leon L. Moise for 1918, *ante,* apply with equal force here.

Gerald F. Schlesinger

(1919)

The return of Gerald F. Schlesinger for the year 1919 was filed on March 15, 1920. (R. 28.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1925. Assuming, for the purpose of explanation here, the validity of the waiver given by petitioner, the time within which assessment and collection might have been made was extended until December 31, 1925. On July 29, 1925, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided in Section 274 (a) of the Revenue Act of 1924. (R. 113.) The mailing of the notice and the filing of the

appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. (See Section 277 (b) of the Revenue Act of 1924; Sections 274 (a), 1001 (c) as amended, and 1005 of the Revenue Act of 1926.)

The considerations which are advanced in the case of Leon L. Moise for the year 1918, *ante,* apply with equal force here.

LeRoy Schlesinger

(1918)

The return of LeRoy Schlesinger for the year 1918 was filed on March 15, 1919. (R. 29.)

The normal five-year period for assessment and collection of 1918 taxes would have expired on March 15, 1924. (See Section 277 (a) (2) of the Revenue Act of 1924; Section 277 (a) (3) of the Revenue Act of 1926.) Assuming for the purpose of explanation here the validity of the waiver given by the petitioner, the time within which the assessment and collection might have been made was extended to March 1, 1925. (R. 29.) Although the record does not reveal the fact that assessment of the deficiency due from LeRoy Schlesinger for the year 1918 was made, it does reveal (R. 190) that a claim in abatement had been made prior to September 4, 1925. Claims in abatement lie only from assessments. The Record does not show when this assessment was made, but if it

was made at any time between June 2, 1924 (the date of the passage of the 1924 Act), and March 1, 1925, the six-year period for collection under Section 278 (d) of the Revenue Act of 1924 applies. *Russell* v. *United States,* 278 U. S. 181. In such case there is no question of the right to collect the tax having expired between March 1, 1925, and September 4, 1925, and the filing of the claim had further suspended the period of limitations before the six-year period could possibly have expired. Section 279 (a) of the Revenue Act of 1926, *supra.*

Moreover, even if the assessment was made prior to June 2, 1924, provided the abatement claim was filed at any time prior to March 1, 1925, Section 279 (a) operated to suspend the period of limitations for collection before it had taken effect.

Since these facts are material and the taxpayer has offered no proof either as to the date of the assessment or the date of the filing of the abatement claim, he failed to overcome the presumption that the Commissioner acted lawfully in making the assessment.

The taxpayer has not established, therefore, that the right to collect the tax had not expired between March 1, 1925, and September 4, 1925. On the latter date the Commissioner of Internal Revenue notified this petitioner of the rejection of his claim in accordance with the provisions of Section 279 (b) of the Revenue Act of 1924 (R. 190) and petitioner appealed to the Board of Tax Appeals (R. 185 *et seq.*). As the claim will not have been

finally disposed of until the decision of the Board of Tax Appeals becomes final, the statute of limitations continues in a state of suspense and will so remain. (See Section 279 (a) of the Revenue Act of 1924, 1001 (c) as amended, and 1005 of the Revenue Act of 1926.)

LeRoy Schlesinger

(1920)

The return of LeRoy Schlesinger for the year 1920 was filed either on March 15, 1921, or on April 6th or 7th. (R. 83–84, 165.)

The normal five-year period for assessment and collection of 1920 taxes would have expired on March 15, 1926 (or April 6, 1926, as contended by petitioner, Brief, 25). On July 29, 1925, within the statutory period of limitation for assessment and collection, the Commissioner of Internal Revenue mailed to petitioner a notice of deficiency as provided for in Section 274 (a) of the Revenue Act of 1924. (R. 154.) The mailing of this notice and the filing of the appeal from the Commissioner's action placed the statute of limitations in a state of suspense in which state it will remain until the decision of the Board becomes final. See Sections 277 (b) of the Revenue Act of 1924; Sections 274 (a), 1001 (c) and 1005 of the Revenue Act of 1926.

The record reveals no waivers filed by LeRoy Schlesinger covering the year 1920 and none are necessary as the deficiency notice was mailed within

the five-year period provided for assessment and collection unextended by waivers.

(b) The waivers given by the petitioners are valid

Moise and G. Schlesinger

The petitioners Moise and G. Schlesinger filed waivers with respect to the taxable years 1918 and 1919, which expired December 31, 1925. (R. 28–29.) As to the year 1918, the waivers were executed by both the petitioners and the Commissioner after the expiration of the statutory period of limitations and as to the year 1919 the petitioners' signatures were affixed prior to and the Commissioner's subsequent to the expiration of the statutory period of limitations. Prior to that time consents were filed which bore the purported signatures of petitioners, but which were repudiated by them. We believe that the waivers which petitioners admitted filing were valid, and hence do not rely upon the disputed waivers.

The waivers were executed while the Revenue Act of 1924 was in effect. Under Section 278 (c) of the Revenue Act of 1924, if valid, they extended the period of limitations to December 31, 1925, and as pointed out in subdivision (a) of this argument the deficiencies were asserted within the period.

The validity is challenged by the petitioners on the ground that they were executed by the Commissioner after the expiration of the statutory period of limitations. The petitioners concede (Br. 41–42) that the Supreme Court has held that

the fact that a waiver is executed by a taxpayer after time for assessment and collection has run does not invalidate them (*Stange* v. *United States,* 282 U. S. 270; *Aiken* v. *Burnet,* 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet, supra*), but argue that the *Stange case* does not control this case and that the Commissioner's signature must be affixed prior to the expiration of the statutory period.

This argument loses all force when it is remembered that the taxpayer's signature to a waiver is normally affixed prior to the time that the Commissioner's signature is affixed. *Moreover,* in the *Stange case* is affirmatively appeared that both signatures were affixed after the running of the statute and the waivers were nevertheless held to be valid.

Obviously, there is less reason for requiring that the Commissioner's signature be affixed prior to the running of the statutory period of limitations than there is for requiring the taxpayer's signature to be affixed prior to that time. It is now well settled that the provision for the Commissioner's signature did not make a waiver a contract but was inserted purely for administrative purposes.

In the case of *Stange* v. *United States, supra,* the Supreme Court said (p. 543):

> * * * a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted *for purely administrative purposes* and not to convert into a

> contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. (Italics supplied.)

and in *Aiken* v. *Burnet, Commissioner, supra*, the same Court added (p. 545):

> Even after the Act of 1921, a so-called waiver was not a contract. The requirement in Section 250 (d) of that Act that the Commissioner sign the consent *was inserted to meet exigencies of administration*, and not as a grant of authority to contract for waivers. (Italics supplied.)

Again, in *Burnet* v. *Chicago Railway Equipment Co.*, Prentice-Hall Federal Tax Service (1931) Vol. I, p. 54, the Court used similar language saying "the Commissioner's signature was required purely for administrative purposes."

It is our position that the Commissioner's signature is not essential to give effect to the waivers and in any event that the fact that they were signed after the running of the statute did not invalidate them.

It is submitted, therefore, that the waivers of February 3, 1925, were valid waivers and that they effectively suspended the running of the statute of limitations until after the date of the mailing of the deficiency notices from which the appeals herein have been taken.

L. Schlesinger

We have pointed out in subdivision (a) of this argument that no waiver was signed by this tax-

payer for the year 1920 and that none was required for the reason that the deficiency notice was mailed prior to the expiration of the five-year period of limitations.

The waiver which was filed in respect to the year 1918 extended the time for assessment, which would otherwise have expired on March 15, 1924, to March 1, 1925. (R. 29.) The effect of this waiver, if valid, has been pointed out in subdivision (a) under this point. Its validity appears to have been challenged on the same grounds as the waivers of the other two petitioners and what we have said as to them applies with equal force here.

III

The Board of Tax Appeals did not err in sustaining the action of the Commissioner in disallowing as a deduction from gross income the alleged loss supposed to have been occasioned by obsolescence of the tangible assets of the partnership resulting from prohibition legislation

The Board of Tax Appeals did not hold that a deduction for obsolescence of tangible assets resulting from the enactment of prohibition legislation may not under any circumstances be allowed under Section 214 (a) (8) of the Revenue Act of 1918 (See *contra Burnet* v. *Industrial Alcohol Co.,* Prentice-Hall Federal Tax Service, 1931, Vol. 1, p. 850; *Loewers Gambrinus Brewery Co.* v. *Anderson,* Prentice-Hall Tax Service, 1931, Vol. 1, p. 847), but held that in these cases the petitioners had not sustained the burden of proving that the part-

nership was entitled to the deduction claimed which the Commissioner had disallowed.

The Commissioner's determination that the partnership was not entitled to a deduction for depreciation was *prima facie* correct (*Green's Advertising Agency* v. *Blair* (C. C. A. 9th), 31 F. (2d) 96), and the burden of proving the Commissioner's action erroneous in the proceeding before the Board was upon the petitioners. *American Sav. Bank & Trust Co.* v. *Burnet,* 45 F. (2d) 548, and cases cited. Moreover, the question as to whether obsolescence had been sustained by the partnership was primarily a question of fact (See *E. G. Robichaux Co.* v. *Commissioner* (C. C. A. 5th), 32 F. (2d) 780), and this Court should not reverse the Board's action sustaining the Commissioner's determination unless the evidence conclusively showed that obsolescence in the amount claimed was actually sustained.

The Board of Tax Appeals found as facts (R. 25, 26) that Leon L. Moise, Gerald F. Schlesinger, and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender, which firm was engaged in the wholesale liquor business from July 1, 1918, to January 16, 1920, the date of its dissolution and the termination of business; that the business had been conducted upon premises which were acquired under the terms of the lease entered into in 1920 between H. Levi & Company, lessor, and Schlesinger and Bender, Inc., a corporation which had

been in existence prior to the organization of the partnership; that the principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for a period of fifteen years; that the lease provided that all additions such as improvements and fixtures should be made at the lessee's expense and that at the cancellation or termination of the lease, these should revert to the lessor; that the lease further provided that no business other than that of the lessee should be conducted on the premises; that, believing that it would be compelled to terminate its business in 1920 by reason of National Prohibition Legislation and believing that its leasehold equipment and improvements would be wholly obsolete at that time the partnership charged off its books as a loss at December 31, 1919, the amount of $7,200.00, the balance remaining in its "Building" account, and $13,965.03, the balance remaining in its "Furniture and Fixtures" account; that upon closing its affairs early in 1920 the partnership sold its furniture and equipment but no entries of such sales were made on its books; that the lease by virtue of which the partnership occupied its business property, was terminated about April 1, 1930 (*sic,* 1920), and shortly thereafter the premises were vacated.

We submit that these findings are not sufficient to establish conclusively that the partnership was entitled to a deduction for obsolescence of its tangible assets used in the liquor business and that

the Board's failure to make further findings is fully explained by the Record. The Board itself made the following summary of the evidence presented (R. 33):

> The first difficulty in granting the petitioners' contention on this point lies in the sufficiency of evidence as to the value of the tangible assets on account of which obsolescence is claimed. The principal evidence presented as to these values was the ledger of the partnership, which showed a balance in the "Building" account at December 31, 1918, of $7,200 and in the "Furniutre and Fixtures" account a balance of $13,965.03. One of the petitioners testified that the $7,200 in the "Building" account represented money which had been expended "in building vats and fixtures and also building a cellar in the building which we had leased," but from an examination of the ledger account it appears that this statement does not mean more than that costs of the character referred to were entered in this account and that after adjustments for depreciation, and possibly for other reasons, the balance of $7,200 remained.
>
> In neither instance do we know how such book values were computed. We have no proof of costs or appropriate rates of depreciation, nor do we have a segregation or identification of the assets upon which the obsolescence was predicated. Neither have we the amount sold or salvaged from the furniture and equipment in 1920. Thus, we have

> no basis on which to determine the amount of obsolescence in either instance. In the absence of evidence the petitioner's contention under this issue must be denied. * * *

An examination of the Record will reveal that the witness, LeRoy Schlesinger, testified that the circumstances surrounding the making of the entries on the ledger were that the $7,200 was what they called a "building account" and "It was customary for us yearly to deduct 10%." (R. 63; Ledger entries referred to—R. 65–67.) It will be noted that the witness did not testify that 10% depreciation was actually deducted but merely that it was *customary* to make such deduction. The actual ledger entries (R. 65–67) are of no assistance whatsoever in determining the question of fact.

Petitioners assert (Br. 48) that the sum of $7,200 was the balance of actual cost remaining. Whether this was true or not is a question which the Board of Tax Appeals was unable to determine from the evidence. So far as the item of $13,965.03 representing alleged loss on account of furniture and fixtures is concerned, the Board of Tax Appeals pointed out that there was nothing in the Record to indicate what amount such furniture and fixtures brought upon sale. Petitioners assert (Br. 49) that subdivision (b) of paragraph 5 of the petitions alleged that the sum of $7,801.18 was the total proceeds from the sales of cooperage, scrap, and office furniture, but examination of the petitions will reveal that the allegation set forth in paragraph 4

(b) thereof is to the effect that the firm of Schlesinger and Bender *reported* in its return of income for the year 1920 the sum of $7,801.18 as income, this being—according to the averment of the petition—the total proceeds from the sale of cooperage, scrap, and office furniture. While respondent admitted in his amended answers that this was true, it does not necessarily follow that the salvage property was sold for this amount. It may have been sold for more or less. The Record fails to reveal the fact.

Petitioner refers to the testimony of LeRoy Schlesinger (Br. 40) and points to the testimony of this witness to support the contention that the Record reveals the sale price of furniture and fixtures. The witness was asked by Mr. Bayer, counsel for petitioner (R. 74): "May I ask one more question: Mr. Schlesinger, when you retired from business in 1920, was any sale made of the furniture and equipment of your business?" To which question the witness replied: "There was * * *. The entry of what it was sold for was only made in a small little pass book covering the amount that we received and was rebated in our income tax of 1920." Upon this state of the Record the question as to what the furniture and fixtures brought upon sale remains highly conjectural. The evidence falls far short of overcoming the *prima facie* correctness of the Commisisoner's determination. The analysis by the Board of Tax Appeals of the testi-

mony and of the evidence upon this point is soundly logical and is in strict conformity with the exact state of the Record. The decision of the Board of Tax Appeals on this point is undoubtedly correct.

IV

Petitioners were not entitled to a reduction of gross income on account of the supposed obsolescence of good will of the partnership

Respondent erroneously allowed the partnership a deduction from gross income on account of the obsolescence of good will, and thus the distributive shares of the partners were reduced and likewise were petitioners' gross incomes. The respondent, recognizing his error, increased petitioners' gross incomes by the inclusion therein of their proportionate shares of the partnership income (Moise, R. 16, 17; Gerald Schlesinger, R. 119; LeRoy Schlesinger, R. 159, 196), and accordingly sought the increase of their taxes. The board of Tax Appeals sustained the action of the Commissioner.

In this respect the case is unquestionably controlled by the decision of the Supreme Court in the case of *Clark* v. *Haberle Brewing Co.,* 280 U. S. 384, in which case that court held that a brewing company was not entitled to a deduction on account of "exhaustion" or "obsolescence" of its good will under the prvisions of Section 234 (a) (7) of the Revenue Act of 1918, which provides that in computing net income there shall be allowed as a de-

duction a "reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The distinctions suggested by petitioners (Br. 53) are not substantial. See also *Red Wing Malting Co.* v. *Willcuts* (D. C. Minn.), 8 F. (2d) 180, affirmed (C. C. A. 8th), 15 F. (2d) 626, certiorari denied, 273 U. S. 763; *Renzichausen* v. *Lucas,* 280 U. S. 387.

CONCLUSION

It is respectfully submitted that the decisions of the Board of Tax Appeals in these cases are correct. Such decisions should be affirmed.

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MARCH, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(7) Debts ascertained to be worthless and charged off within the taxable year;

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

(d) The net income of the partnership shall be computed in the same manner and

on the same basis as provided in section 212 except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the

collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 273. As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize

duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

SEC. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection there-

with, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner, who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. If the claim is denied in whole or in part by the Commissioner (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the collector, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount, claim for which is allowed by the Board. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

* * * * *

(d) Except as provided in this section, no claim in abatement shall be filed in respect of any assessment made after the enactment of

this Act in respect of any income, war-profits, or excess-profits tax.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency

to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional

deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the

tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

Section 1001 (c) as amended by Section 603 of the Revenue Act of 1928:

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board

not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the ex-

piration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

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